IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-646

EDWARD GRADY PARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

HERBERT J. MILLER, JR.
MARTIN D. MINSKER
WILLIAM H. JEFFRESS, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for Petitioner

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases, continued: Page

Miscellaneous:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-646

EDWARD GRADY PARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

INTRODUCTION

In our Petition, we urged this Court to grant certiorari for two reasons. *First*, the rulings of the lower court in this case on the existence of an "actual conflict of interest," the locus of the burden of showing "specific prejudice," and the existence of that prejudice on this record all conflict with rulings of other circuits as well as controlling principles from this Court's decisions. *Second*, the case poses basic constitutional and ethical issues going to the very heart of the administration of

federal criminal justice in the adversary system and the appropriate behavior of judges and lawyers in that system.

The twenty-four page Brief in Opposition demonstrates the validity of the reasons we advanced for granting plenary review in this case. Thus, respecting the cases we cited to demonstrate conflicts among the circuits, the Brief in Opposition makes no genuine effort to distinguish these contrary rulings. Indeed, the government takes express note of the cases cited in our petition on the "actual conflict" issue and observes ". . . petitioner correctly states the general rule that when an attorney simultaneously represents a defendant and a prosecution witness testifying against his client, a conflict of interest is established that renders the trial fundamentally unfair (*See* Pet. 17-23)." Br. in Opp. 11. Respecting the "waiver" and "prejudice" issues, the government simply ignores the squarely conflicting holdings in cases such as *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir. 1979), *Stephens v. United States*, 595 F.2d 1066, 1067 (5th Cir. 1979), and *People v. Stoval*, 40 Ill. 2d 109, 113-14, 293 N.E.2d 441, 444 (1968), discussed in our Petition at pp. 25-27. Thus it is apparent—and uncontested by the government—that the courts which decided these cases would never have found a "waiver" of petitioner's Sixth Amendment rights, or placed the burden on the prejudice issue on petitioner, on the record in the instant case.

Respecting the importance of this case to the administration of justice, the government acknowledges, as it must, that "[t]he court of appeals found (Pet. App. 8a-9a) that the prosecutor's conduct constituted an ethical violation." Br. in Opp. 21. Then the government takes the position, *inter alia*, that "it is our view that

the prosecutor's conduct was not unethical under the circumstances of this case." Br. in Opp. 22. As we show hereinafter, this view rests on the analytical premise that Disciplinary Rule 7-104 does not "have general application to criminal cases . . . ." Br. in Opp. 22 n.16. We demonstrate hereinafter that this premise is flatly contradicted by federal appellate decisions and, indeed, is actually rejected by the three cases the government tenders to this Court to support its position on this part of the case. See pp. 18-19, *infra*.

Moreover, the prosecutor's conduct was the incipient cause of the actual conflict of interest invading petitioner's Sixth Amendment right to the assistance of counsel with undivided loyalties.[1] Indeed, on the premise that the prosecutor telephoned the trial judge prior to the trial and informed the judge that Sykes had given a statement and that he was going to be a witness (see pp. 6-7, *infra*), the prosecutor also violated the ethical prohibition against *ex parte* communications with judges. D.R. 7-110, A.B.A. Code of Professional Responsibility.

---

[1]As the government observes, "petitioner contends . . . that reversal is required because the conflict of interest arose as a result of the government attorney's misconduct in not notifying McPherson of his contacts with Sykes . . . ." Br. in Opp. 21. Yet the government maintains that "petitioner does not have standing to raise a constitutional or ethical challenge to the prosecutor's conversing with Sykes without the knowledge of Sykes' counsel." Br. in Opp. 22.

"Standing" is not an issue in this case. Thus, it is admitted that: (a) the prosecutor knew of the joint representation of petitioner and the witness; and (b) deliberately concealed from petitioner and his counsel the fact of his contacts with Sykes and Sykes' status as a cooperating witness. Assuming the prosecutor's conduct was unethical, and assuming no valid "waiver" (see pp. 12-17, *infra*), that prosecutorial misconduct was the direct cause of an invasion at petitioner's trial of his own personal Sixth Amendment right to counsel with no actual conflict of interest.

It is of vital importance to the administration of criminal justice in our federal courts that prosecutors, defense attorneys, trial judges, and individual defendants know in advance the governing rules for their behavior in the criminal justice system, especially as these rules relate to the recurring problems connected to joint representation. Defense attorneys and their clients, in deciding on the necessity for individual representation, today rely on the expectation that prosecutors will not engage in a surreptitious course of conduct—forbidden by the canons of ethics—culminating in an actual conflict of interest at trial threatening their personal constitutional rights. This case puts in issue the continued validity of that assumption, burdening the ability of lawyers and judges to discharge their duties in accordance with constitutional commands and ethical duties. Moreover, the very posture of the Department of Justice in this Court—asserting in the face of the opinion below the ethical propriety of its conduct in this case—shows the necessity for plenary review of these issues now. In this regard, we take note of the observations of then-Circuit Judge Stevens respecting the ethical prohibition of D.R. 7-104 on prosecutors communicating with criminal defendants represented by counsel:

> In a civil context I would consider this behavior unethical and unfair.[2] In a criminal context I regard it as such a departure from "procedural regularity" as to violate the due process clause of the Fifth Amendment.[3] If the evidence of guilt is as strong as the prosecutor contends, such direct communication is all the more offensive because it was unnecessary. If there is doubt about defendant's guilt, it should not be overcome by a procedure such as this.

United States v. Springer, 460 F.2d 1344, 1355 (7th Cir. 1971) (dissenting opinion) (footnotes omitted).

Hereinafter, we deal with the particular arguments the government makes regarding the contentions in our petition.

1. Sykes' Waiver of the Attorney-Client Privilege Did Not Eliminate the Actual Conflict of Interest.

As we noted, the government acknowledges "the general rule that when an attorney simultaneously represents a defendant and a prosecution witness testifying against his client, a conflict of interest is established that renders the trial fundamentally unfair . . . ." Br. in Opp. 11. But the government contends that, once faced with such an "actual" conflict of interst, the trial judge here was free to "endorse measures approved by one of the clients" (*id.*) that "will eliminate [the conflict] during trial," and that the waiver of the attorney-client privilege by the witness constituted such a measure. See *id.*, 11-15. The government's reasoning on this issue is a transparent series of non-sequiturs.

First, both petitioner and the prosecution witness (Sykes) had an equal claim to their attorney's undivided loyalty under the Sixth Amendment. The government admits that petitioner personally and emphatically rejected the trial court's proposed "measure" to resolve the conflict. See Petition 12 and compare Br. in Opp. 9-10.[2] It simply makes no sense to contend that an

---

[2]After the court had denied attorney McPherson's mistrial motion and extracted a "waiver" of the attorney-client privilege from Sykes, petitioner (a lay person) personally addressed the court stating "I found out a few minutes ago that I have an attorney here representing me and a government witness," that "I certainly don't want to proceed in a trial" and that "I don't want him representing me in this trial." Tr. 326.

otherwise inappropriate measure proposed by the trial judge to resolve an admitted actual conflict of interest somehow becomes "appropriate" by virtue of the agreement of one of the clients in the face of the other client's refusal to agree.

In this section of the Opposition Brief, only one case is advanced as supporting this extraordinary contention, *United States v. Vargas-Martinez,* 569 F.2d 1102, 1104 (9th Cir. 1978), discussed at Br. in Opp. 12. The *Vargas* case stands for the opposite proposition, and, to the extent relevant, requires rejection of the government's novel contention in this Court.

In *Vargas,* the appellant was complaining that the trial court had *refused* to allow him to keep the same lawyer that represented a prosecution witness, despite his waiver of "any conflict of interest arising out of this situation . . . ." 569 F.2d at 1104. The prosecution witness (also a co-defendant who was not jointly on trial) had refused to waive any conflict of interest. The appellate court affirmed the trial court's ruling on the expressly stated "basis that the dual representation created an inescapable conflict of interest which had not been waived by both co-defendants." Not a word in this Ninth Circuit decision even plausibly supports the notion that an actual conflict of interest may be dissipated by "waiver" of one client in the face of a refusal on the part of the other client to waive.[3]

Second, the untenability of the government's position in this portion of its brief is demonstrated by the government's assertion that "*[u]pon learning of the conflict of interest,* the trial court held a hearing on the matter . . . ."

[3]Nor has the Government produced any genuine supporting authority from any other circuits for this proposition.

Br. in Opp. 11-12 (emphasis added). But, on the government's own version of the record, this statement is simply untrue. Thus, elsewhere in the Opposition Brief, the government points out that the prosecutor "did, however, inform the court of what Sykes had told him (Tr. 310)." Br. in Opp. 23. That telephone conversation between the trial judge and the prosecutor occurred *well before* the trial even began.[4] Yet, assuming this unethical *ex parte* communication occurred, the trial judge *did not* in fact hold a hearing "upon learning of the conflict of interest" (Br. in Opp. 12). We pointed out in our initial Petition that the trial judge therefore violated his affirmative duty to apprise petitioner and his counsel of the circumstances and provide him, then and there, with an opportunity to secure separate counsel. *See* Petition 26 and n.11. Yet the Opposition Brief simply ignores this point, and offers no discussion of our cited authorities.

It is instructive, though, to assume hypothetically that the trial judge, after the asserted telephone conversation, and perhaps two weeks prior to the commencement of trial, had actually called a hearing (in advance of trial) at which petitioner and McPherson were informed that Sykes had given the government inculpatory statements and was now going to be a prosecution witness. Suppose, further, that petitioner had said that, in view of this development, he wanted to retain new counsel. We submit that, under this Court's ruling in *Holloway v. Arkansas,* 435 U.S. 475, 488 (1978) (*see* Petition 27),

[4]Tr. 310. Assistant U.S. Attorney Mayo claimed "shortly after September the 9th" he called the judge "to advise you that Harold Sykes had given a statement in which—and he was going to be a witness in the trial." (To this assertion the judge responded, "I don't recall, but I am sure you did.") The trial commenced on September 26, 1977.

the trial judge incontestably would have had to allow petitioner to change attorneys, without regard to the willingness of the prosecution witness to allow himself to be cross-examined on privileged information. Here, of course, the hypothetical pre-trial hearing was never held; rather, because of the prosecutor's decision to conceal his surreptitious dealings with Sykes and the trial judge's lapse, the actual conflict could not be confronted until after the trial commenced. Assuming at this point the hearing was "untimely" (Br. in Opp. 15 n.10), with the trial judge and the prosecutor jointly having concealed from the defendant the knowledge they had shared for perhaps two weeks prior to trial, the one participant who *cannot* be blamed for the "untimeliness" regarding the hearing is the defendant.

Third, the government seeks to demonstrate the "appropriateness" of the trial judge's solution to the actual conflict of interest created by the prosecutor's misconduct by arguing that after the trial court itself "suggested that McPherson would no longer be able to represent Sykes" (Br. in Opp. 14), McPherson said Sykes didn't have to fire him, but instead, if he waived the attorney-client privilege, McPherson personally would be "covered." *Id.*, at 14, citing Tr. 318 (sic).

The short answer to this contention is that petitioner personally rejected this solution. See pp. 5-6, *supra.* Given the fact that the prosecutor and the judge together had, through their respective breaches of duty, created a circumstance where petitioner suddenly found himself in the middle of a criminal trial with his own lawyer (in the prosecutor's own words) "on both sides of the fence" (*see* Petition 9), petitioner could not be constitutionally compelled to proceed over his own personal timely

objection with a lawyer in whom his personal confidence had been shattered.[5]

Moreover, attorney McPherson's statement, now relied on by the government, must be placed in the context of the record. The first step taken by McPherson after the prosecutor's disclosure was to move for a mistrial on the ground of a "hopeless conflict" in order that petitioner would have "an opportunity to obtain counsel where there will not be a conflict." Tr. 308. That position was also urged by petitioner's local counsel. Tr. 310. The prosecutor opposed that motion (Tr. 311-13) and the trial court denied it. Tr. 313-14. Only after the court had refused petitioner a mistrial that would have allowed petitioner to get new counsel did McPherson raise the question how he could examine Sykes on privileged information. And, in raising this question, McPherson made clear that he was now talking about his own personal legal exposure in light of the Court's prior ruling denying the mistrial motion. Tr. 314.[6]

After McPherson raised his personal problems, it was the prosecutor who first proposed a waiver by Sykes of the attorney-client privilege as the solution to that problem. Tr. 315.[7] The trial judge then picked up the

---

[5]It is worth emphasizing the petitioner stated at the trial that "I found out a few minutes ago that I have an attorney here representing me and a government witness." Tr. 326. The government at trial did not challenge this assertion.

[6]"We have taken care of the Court's problems and the U.S. Attorney's problems, let's talk about my problems."

[7]McPherson's response painfully illustrates the extraordinary personal professional dilemma he was trapped in by: (a) the prosecutor's surreptitious course of dealing with his client; (b) the trial judge's apparent failure to schedule a prompt pretrial hearing in

[footnote continued]

prosecutor's proposal for a waiver of the attorney-client privilege, suggesting that "we will have to talk to Mr. Sykes about that and see whether he waives his attorney-client privilege and whether he specifically wants to discharge you as his attorney." Tr. 316. Petitioner's local counsel immediately stated (Tr. 316):

> I think there is no question that without in any way changing the prior position taken by counsel for the defendant, Your Honor, that he has to waive the attorney-client privilege and discharge McPherson.

The prosecutor responded by stating (Tr. 316):

> I don't agree with that at all.

That statement clearly put the prosecutor on record as taking the position that the joint representation could go forward even over petitioner's personal objection as long as there was a waiver of the attorney-client privilege. The trial court, for its part, responded by reiterating the denial of the mistrial motion. Tr. 317. In response to the judge's reiteration of his ruling on the mistrial motion, McPherson began again to reargue that issue, to which the prosecutor interjected that (presumably on the basis of the trial judge's earlier ruling) petitioner had "entered his waiver." Tr. 317. Thereafter attorney McPherson returned to a discussion of "my problem"

---

light of the *ex parte* communication from the prosecutor; and (c) the denial of the mistrial motion (Tr. 315, emphasis added):

> What I am saying is that in the representation of Sykes that I have obtained information, you know, from him in preparation of his trial and now to cross-examine him, then I may have to go after his credibility. Now, if he is still my client or unless he waives the attorney-client relationship and in writing, you know, absolves me of any responsibility— *I mean I don't know whether that does it or not, I don't know.*

(Tr. 317), making the statement relied upon by the government (Tr. 318):

The Court: Any suggestions?

Mr. McPherson: I have a suggestion.

The Court: I want to help you out any way I can, Jim.

Mr. McPherson: That is what I want. I appreciate that, and I understand that you recognize my problem. What I would request is, I don't think we have to go so far as to require Mr. Sykes to fire me. I think what he has to do before I can proceed on cross-examining him is waive the attorney-client privilege. And if he does that then I think I am protected. Now, I still urge my mistrial.

The Court: I understand that.

Mr. McPherson: But I am looking out for me too. I don't want Mr. Sykes to write the bar association and say my lawyer—

The Court: All of this could have been—

Mr. McPherson: —he got me on cross-examination and tore me up.

The Court: All of this is done on top of the table. And let it be understood that I will do anything I can to assure that there is no embarrassment to you or no reflection on you or your representation.

Mr. McPherson: Right.

The Court: I also have—as much as I love you I have a higher responsibility to this lawsuit.

Through it all sat petitioner—a lay person witnessing the spectacle of a prosecutor, having secretly gotten his own lawyer "on both sides of the fence," having implicated the trial judge through a pretrial *ex parte* communication, and naving proposed a solution leaving his own lawyer with the joint representation, now succeeding in selling his proposed solution as a way out of the defense lawyer's, the judge's, and the prosecutor's problems. The whole spectacle left petitioner naked and isolated, with the trial judge and defense lawyer reduced to scrambling to cover themselves in light of the prosecutor's actions. Fortunately, petitioner had the presence of mind to stand up and protest this convenient solution among the lawyers and the judge; yet, even had he stood silent, no appellate court, mindful of the Sixth Amendment's command, should tolerate a conviction secured after such a spectacle in an American courtroom.[8]

2. There Was No "Waiver" of Petitioner's Sixth Amendment Right.

The Brief in Opposition does not challenge our assertion that, under the cases of this Court and all the other circuits, the government has the burden of proving waiver

[8]Attorney McPherson did his best to protect his client by moving first for a mistrial and re-urging that motion. And co-counsel specifically objected to the adequacy of the prosecutor's and the trial judge's proposed solution to the actual conflict. In light of the court's ruling, attorney McPherson found himself forced on the record to concentrate on protecting himself, the precise posture a trial judge must never be allowed to put a criminal defense lawyer in. *See generally* Petition, pp. 15-21.

in this case under the strictest possible standards. See *Brewer v. Williams,* 430 U.S. 387, 403-04 (1977); Petition, pp. 23-24, and cases cited therein. Rather, the Brief in Opposition now advances three circumstances to argue that the government has met its stringent burden in this case: (1) the May, 1974 hearing; (2) the testimony of another original co-defendant (Ben Trantham) at petitioner's second trial; and (3) the filing by the prosecutor of writs of *habeas corpus ad testificandum* to secure the presence at trial of Sykes and two other incarcerated convicted co-defendants. See Br. in Opp. 18-21. Again, the government's arguments fail.

First, as the lower court in this case actually acknowledged, and as we pointed out in our Petition, a valid finding of waiver cannot be based on Judge Scott's May, 1974 hearing alone, since the operative events giving rise to the actual conflict of interest—the prosecutor's secret dealings with Sykes leading to his status as a prosecution witness—had not yet occurred. See Petition, 13a; *id.*, 26-27. The Brief in Opposition does not challenge this assertion; instead, after referring to the May, 1974 hearing (Br. in Opp. 18-19), the Brief slides off into reliance on the other two enumerated factors. *Id.*, 20-21.

Suppose, then, that at the time of the May, 1974 hearing, the prosecutor had secretly secured inculpatory statements from one of the co-defendants. Assume further that writs of *habeas corpus ad testificandum* had issued at the prosecutor's request to assure the availability of the co-defendant as well as others, and that at an earlier trial another co-defendant had testified, but that petitioner had gotten different counsel to represent him at that trial. Suppose the prosecutor had allowed the May 1974 hearing to go forward without telling the judge or his opponent about his secret arrangement with one

of the defendants standing in the courtroom. Or, indeed, assume alternatively that the prosecutor had told Judge Scott in an *ex parte* telephone conversation before the May 1974 hearing that he had lined up one of the jointly represented co-defendants as a prosecution witness, and Judge Scott had failed to disclose this communication to petitioner or his counsel at or prior to the May, 1974 hearing. We submit that no lawyer would attempt to persuade this Court or any appellate court that the government had, in these circumstances, met its burden by going forward with the 1974 hearing exactly as it occurred, with petitioner and his lawyer kept in the dark by the prosecutor and/or the trial judge as to the true status of the co-defendant. Yet the stated hypothetical facts reflect the actual record in this case as it stood some two weeks or more prior to the commencement of petitioner's third trial.

In any event, in our Petition we discussed several cases in which other courts had confronted factual circumstances going far beyond the enumerated factors relied upon to show "waiver" here, and yet rejected "waiver" claims.[9] The Brief in Opposition fails to distinguish these cases, or to offer this Court even a single authority plausibly supporting its assertion that a valid finding of waiver may be made on the basis of the enumerated factors.[10]

---

[9] *Zuck v. Alabama, supra,* 588 F.2d at 440; *People v. Stoval,* 40 Ill. 2d 109, 113-14, 239 N.E.2d 441, 444 (1968). *See* Petition, 25; *see also Stephens v. United States, supra,* 595 F.2d 1067, discussed at Petition, p. 18.

[10] The Brief in Opposition relies on *United States v. Villarreal,* 554 F.2d 235, 236 (5th Cir.), *cert. dismissed,* 434 U.S. 802 (1977), as standing for the proposition that "a defendant can waive not

[footnote continued]

Finally, the government's miscellaneous assertions on the waiver issue merely serve to demonstrate again the necessity for plenary review in this case.

First, respecting the May, 1974 hearing, the government simply ignores the fact that at the conclusion of that hearing, McPherson stated to Judge Scott that "if any of these individuals in any way indicate to me any possible conflict or concern that they have I would like to feel free to bring it to the court," and that "I don't want to represent someone in that situation or have them feel that they aren't getting their best representation." M. Tr. 10. The Court agreed to McPherson's suggestion, cautioning him that "I don't want that to happen in the middle of a trial." *Id.* Again, suppose at that very moment the prosecutor and the trial judge had been secretly concealing the knowledge that one of "these individuals" had already been converted into a cooperating prosecution witness.

Second, respecting the writs of *habeas corpus ad testificandum,* Assistant U.S. Attorney Mayo, in the lengthy colloquy ensuing after he finally disclosed his secret dealings with Sykes and the trial judge, made no reference whatsoever to this factor as putting petitioner's counsel on notice that Sykes would be called as a prosecution witness. Indeed, a fair reading of the entire relevant transcript (Tr. 295-370) shows that all the participants in these events—the prosecutor, both defense attorneys, the trial judge, and McPherson—uniformly reacted

---

only existing conflicts, but also possible conflicts to which he had been alerted." See Br. in Opp. 20 n.15. In *Villarreal,* the Court found a valid waiver on the basis that the defendant had been warned by the trial judge of the actual facts creating the conflict. There were no intervening operative facts rendering the judge's prior warning inadequate.

throughout to the prosecutors' disclosure as total surprise to both McPherson and petitioner. That of course simply reflects what prosecutor Mayo and every experienced attorney well know: *i.e.*, in a criminal trial where the government has in custody potentially involved co-defendants whose presence at trial might subsequently be needed by *either* side or, indeed, the trial judge himself, it is a frequent precaution for the prosecutor to secure such writs to move the incarcerated persons into the jurisdiction in advance of trial. From the mere issuance of such a writ for one of his own clients, no experienced defense lawyer would draw the inference that the prosecutor had secretly lined up the client as a cooperating witness. McPherson, after all, had a right to rely on the assumption that the prosecutor would abide by the canons of ethics and refrain from communicating with his client without advance notice. Moreover, as McPherson stated at the trial after Mayo disclosed his surreptitious dealings with Sykes, "[a]t no time in my representation of Mr. Sykes was there a conflict between the version of the facts that Mr. Sykes gave me as to my other client, Mr. Partin." Tr. 306. The government has never contested this statement; it is apparent that McPherson therefore had no facts in his possession on which to assume that Sykes would testify to a story different from the one he had been consistently telling his own lawyer. The writs, then, are a transparent make-weight argument thought up *post hoc* on appeal in a vain attempt to avoid the inescapable record actually made by the prosecutor and the trial judge at the time of the operative events.[11]

---

[11]The first time the issuance of these writs was ever mentioned was in the government's brief on appeal. Yet, not even the lower

[footnote continued]

Finally, respecting the testimony at petitioner's second trial of Ben Trantham (another co-defendant represented by McPherson), the short answer to this supposed indicium of "waiver" is that petitioner secured different counsel to represent him at this second trial, and Trantham had died before the commencement of the third trial. From these circumstances, the only logical inference is that the government should have assumed that petitioner would not go into a third trial represented by a lawyer who also represented a prosecution witness.[12]

3. The Prosecutor's Conduct Violated D.R. 7-104

The Opposition Brief challenges the lower court's finding that the prosecutor's surreptitious dealings with Sykes violated D.R. 7-104, contending, *inter alia*, that: (1) "D.R. 7-104 is of marginal relevance where the defendant's conviction has been affirmed on appeal and the only remaining stage of the case is a pending

---

court, which strained every circumstance in the trial record to find a waiver, was willing to rely on this factor.

Moreover, we note that the government is simply contradicting itself in attempting to show that the prosecutor was putting McPherson on notice that Sykes had become a prosecution witness. Elsewhere in the Brief in Opposition, the contention is made that the prosecutor acted ethically in "respecting" Sykes' request that he inform "no one" of his cooperation, for alleged fear of his safety. Br. in Opp. 23. If that was Mayo's true motivation, then he could not have intended, nor could he have expected, that issuance of the writs would put McPherson "on notice that his client might be called." *Id.*, 24. As with so many other aspects of the government's brief in this Court, these assertions are simply a hopeless tangle of self-contradictions.

[12]The record also indicates that Trantham actually ended up testifying at petitioner's second trial *both* as a defense and a government witness. Tr. 31.

petition for a writ of certiorari," Br. in Opp. 22; and (2) D.R. 7-104 should not "have general application" to criminal cases. *Id.*, n.16.

First, the government does not proffer to this Court an iota of logic, policy, or case support for the extraordinary statement that the ethical prohibitions of D.R. 7-104 have "marginal relevance" to defendants seeking relief in this Court from convictions they claim were unlawfully secured. Surely, though, such a statement, proffered by the most prestigious legal office of the Department of Justice, should command the closest scrutiny of this Court. This Court should grant plenary review of this case, so the Department's lawyers, as well as defense attorneys and their clients, can have no doubts as to their proper ethical footing when a case is presented to this Court for review.

Second, as the very authorities relied upon by the Brief in Opposition (at page 24) demonstrate, D.R. 7-104 applies to criminal cases. *See United States v. Crook,* 502 F.2d 1378, 1380 (3d Cir. 1974), *cert. denied,* 419 U.S. 1123 (1975); *Moore v. Wolff,* 495 F.2d 35, 37 (8th Cir. 1974); *United States v. Masullo,* 489 F.2d 217, 223 (5th Cir. 1973).[13] *See also United States v. Springer,*

[13]The Opposition Brief cites these three cases, albeit with a "cf." signal, as standing for the proposition that, "[u]nder these circumstances, there was clearly no ethical violation." Br. in Opp. 24. None of them support that statement; indeed, two of the cases indicate that: (a) the courts recognize the application of the relevant ethical prohibition to criminal cases; and (b) the likelihood that the conduct there in issue violated the ethical rules. *United States v. Crook, supra,* 502 F.2d at 1380; *Moore v. Wolff, supra,* 495 F.2d at 37. In *United States v. Masullo, supra,* the court found no violation of D.R. 7-104 because there the defendant's alleged attorney actually represented him in other unrelated state criminal cases. *See* 489 F.2d at 223. But in

[footnote continued]

460 F.2d 1344, 1353-54 (7th Cir. 1971), *cert. denied,* 409 U.S. 873 (1972); *Wilson v. United States,* 398 F.2d 331, 333 (5th Cir. 1968), *cert. denied,* 393 U.S. 1069 (1969); *United States v. Thomas,* 474 F.2d 110, 112 (10th Cir.), *cert. denied,* 412 U.S. 932 (1973).[14]

Thus the Brief in Opposition again fails to offer this Court a single authority even plausibly supporting its assertions that D.R. 7-104 does not have "general application" to criminal cases and that the rule was not violated by the prosecutor in this case. Moreover, the reasoning of the government to support those assertions fails.

The Brief in Opposition cites *Faretta v. California,* 422 U.S. 806 (1975), as supporting the proposition that Sykes had "a constitutional right to act on his own behalf in communicating with the government under the circumstances here presented." Br. in Opp. 21-22. *Faretta* held that a criminal defendant has a constitu-

Masullo the court actually collected the authorities demonstrating that "prosecutors in criminal proceedings are governed by [D.R. 7-104]." 489 F.2d at 223 n.3.

These cases do question the application of the exclusionary rule to statements secured in violation of the canons of ethics, an issue not posed in this case, where the government has acknowledged the "general rule that when an attorney simultaneously represents a defendant and a prosecution witness testifying against his client, a conflict of interest is established that renders the trial fundamentally unfair." Br. in Opp. 11.

[14]The Brief in Opposition suggests that the rule in *Massiah v. United States,* 377 U.S. 201 (1964), should govern the allowable contacts between Federal prosecutors and criminal defendants in lieu of D.R. 7-104. Br. in Opp. 22 n.16. This Court's decision in *Massiah* cannot be read as intending to displace the ethical restraints on prosecutors. *See* Justice White's dissent in *Massiah,* 377 U.S. at 210-11; *see also United States v. Springer, supra,* 460 F.2d at 1354; *United States v. Thomas, supra,* 474 F.2d at 112.

tional right to represent himself in a state criminal case; nothing in that case suggests that the Court intended to question the constitutionality of prohibiting government lawyers from surreptitiously dealing with lay persons whom the government has sued and whom the government knows are represented by counsel. Indeed, if the government has correctly read *Faretta,* then that case puts in doubt the constitutionality of D.R. 7-104 in all its applications, civil and criminal.

The ethical confusion manifested by the Brief in Opposition should be of the greatest concern to this Court. Thus it is argued that "[a] lawyer for the government cannot be thought to commit an ethical violation when he respects the wishes of an individual to exercise his constitutional right to represent himself in dealings with the government." Br. in Opp. 23. But, while prosecutor Mayo was engaging in surreptitious dealings with Sykes, the latter continued to be represented by Attorney McPherson; indeed, McPherson at the time was actually appointed by the court to represent Sykes. See Opp. Br. 7 n.5. If Sykes wished to "represent" himself, he was free to apply to the court under *Faretta* to discharge his lawyer. Until McPherson was discharged, the prosecutor was ethically bound to refrain from talking to Sykes without first getting McPherson's permission, without regard to Sykes' personal desires for concealment of his dealings with the government.[15]

---

[15] We pointed out in our Petition—and the government does not question—that: (a) nothing in the record supports any contention that petitioner had ever made any threats against any witnesses in connection with this indictment; and (b) there was never any explanation why Sykes in any event could not have been adequately protected by the government. Petition 8 n.5.

4. The Government's "No-Specific-Prejudice" Arguments Fail

We note that, assuming we have demonstrated there existed an unwaived actual conflict of interest in McPherson's joint representation of petitioner and Sykes, and, assuming that any "untimeliness" in the discovery of this conflict was the fault of the prosecutor and/or the trial judge, petitioner's conviction must be reversed without the necessity to demonstrate "specific prejudice." See Pet. 27-28; *see also Stephens v. United States, supra,* 595 F.2d at 1069-70. *A fortiori,* the lower court's decision here, which placed the burden of proof on this issue on petitioner (Pet. App. A, p. 17a), must be reversed.

Moreover, the government's attempt to demonstrate the absence of prejudice merely confirms the wisdom of this Court's warning in *Holloway v. Arkansas, supra,* 435 U.S. at 491, against indulging in *post hoc* "unguided speculation" as to the tactical decisions of lawyers on a cold record. It is noteworthy that the government makes no attempt to persuade this Court that Sykes' testimony was insignificant or merely cumulative. Also, as the government correctly states, Sykes (as well as McPherson) certainly knew from the witness stand that prosecutor Mayo was the government official "responsible for his fate." Br. in Opp. 23. Yet this witness—so damaging to petitioner and so painfully vulnerable on cross-examination—was not significantly cross-examined at all.

The government's sole explanation for this event is that this Court may infer from the record that McPherson made a tactical judgment to "limit" his cross-examination of Sykes because he did not want Sykes' conviction brought out. Br. in Opp. 16. The lynchpin of this

reasoning is that "McPherson's cross-examination of co-defendant Jack Gremillion, Jr., . . . was limited in the same manner . . . ." *Id.* at 17.

That is simply not so. Gremillion was cross-examined by McPherson fairly extensively. *See* Tr. 261-83; *compare* the cross-examination of Sykes, Tr. 368-70. Yet, when the prosecutor tried to use the cross-examination to justify bringing out Gremillion's prior conviction, the trial judge sustained McPherson's objection. Tr. 291. Thus, McPherson must have known that the trial judge would have permitted at least some significant cross-examination of Sykes without allowing the prosecutor to put in his prior conviction. Yet McPherson made no significant attempt at all to test Sykes' recollection or otherwise pin down or limit the damaging effect of his testimony.

Most importantly, whatever McPherson's subjective thoughts were as he confronted the spectacle of his client Sykes waiting to be cross-examined on behalf of his client Partin, we submit that petitioner had an absolute constitutional right to have such critical tactical judgments made by an attorney unencumbered by a conflict of interest generated by the lapses of the prosecutor and the trial judge.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT J. MILLER, JR.
MARTIN D. MINSKER
WILLIAM H. JEFFRESS, JR.

MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 2003
(202) 293-6400

Attorneys for Petitioner